

A **BANDAR UTAMA CITY CORPORATION SDN BHD & ORS v.
JABATAN PERANCANG BANDAR & DESA NEGERI SELANGOR
& ORS**

HIGH COURT MALAYA, SHAH ALAM
CHAN JIT LI JC

B [CIVIL SUIT NO: MT-21-4-2010]
22 OCTOBER 2017

C **ADMINISTRATIVE LAW:** *Exercise of administrative powers – Local authority – Issuance of notice under s. 13 of Street, Drainage and Building Act 1974 – Conversion of alternative temporary road to public road – Objection – Doctrine of legitimate expectation – Whether local authority gave undertaking to close temporary road upon completion of permanent road – Whether local authority bound by doctrine of legitimate expectation*

D **ADMINISTRATIVE LAW:** *Exercise of administrative powers – Local authority – Issuance of notice under s. 13 of Street, Drainage and Building Act 1974 – Validity of – Conversion of alternative temporary road to public road – Whether local authority complied with requirements under s. 13 – Whether s. 13 notice invalid*

E **LOCAL GOVERNMENT:** *Street – Notice under s. 13 of Street, Drainage and Building Act 1974 – Validity of – Conversion of alternative temporary road to public road – Whether local authority complied with requirements under s. 13 – Whether s. 13 notice invalid*

F The plaintiff ('BU') was the owner of many parcels of land, which were contiguous. Due to the construction of the North Klang Valley Expressway (NKVE) highway, some of the lands were compulsorily acquired by the State Authority of Selangor. While some acquisitions involved the whole of the lands, others were acquired in parts. The various acquisitions fragmented BU's otherwise contiguous lands. In order to develop its remainder lands, BU
G needed to reconnect the severed lands by way of building an overhead bridge over the fifth defendant's land. By way of a letter dated 13 September 1991, the fifth defendant granted its permission to BU. The letter was also addressed to Tropicana Golf and Country Resort ('Tropicana'), another land owner within the same vicinity which also faced the problem of access.
H Among the conditions attached with the fifth defendant's permission was that the fifth defendant required two roads; each to be built by BU and Tropicana (i) the first road was to be a permanent road, known as Jalan Hilir Bandar Utama ('Jalan Hilir'); (ii) the other road ('Jalan Tanjung') was intended to be a temporary access road to address Tropicana's immediate need for an access to its lands pending the creation of Jalan Hilir. Once Jalan Hilir comes into
I existence, and after construction completes, Tropicana could access its lands by using Jalan Hilir and the temporary access road would be closed. Both

BU and Tropicana accepted the conditions laid down by the fifth defendant and BU undertook to construct Jalan Hilir, whilst Tropicana agreed to construct Jalan Tanjung. Upon completion of Jalan Hilir, BU gave Tropicana notice of intention to close Jalan Tanjung. However, BU faced opposition and the relevant State Authorities stepped in to find a solution. BU was asked to defer the closure of Jalan Tanjung pending the completion of another project known as the Twin Tunnels project which BU acceded to. Upon completion of the Twin Tunnels project, BU once again attempted to close Jalan Tanjung, but still faced opposition. This time, the fourth defendant stepped in and requested BU to again defer the closure to enable the fourth defendant to conduct a traffic study for a duration of two weeks. BU acceded to the request again. However, before the completion of this two-week period, the fourth defendant issued a notice pursuant to s. 13 of the Street, Drainage and Building Act 1974 ('the Act') ('s. 13 notice') making clear its intention to convert part of Jalan Tanjung into a public road. BU, in exercise of its right as a frontager under s. 13(4) of the Act, filed its objections to the s. 13 notice. When the fourth defendant failed to respond to its objections, BU instituted the instant action against the fourth defendant premised on the doctrine of legitimate expectation, the doctrine of equitable estoppel and procedural non-compliance with s. 13 of the Act. At the same time, BU secured a court order to stay all further actions in respect of the s. 13 notice pending the disposal of this matter. The issues for the court's determination herein were: (i) whether the fourth defendant was bound by the doctrine of legitimate expectation to close Jalan Tanjung; (ii) whether the fourth defendant was bound by the doctrine of equitable estoppel to close Jalan Tanjung; and (iii) whether the s. 13 notice issued by the fourth defendant was valid.

Held (allowing application in part):

- (1) The private law element was predominant in this case and there were no legal issues of public importance. BU's so-called challenge of a decision by a public authority, *ie*, the fourth defendant, was nothing more than a collateral issue to BU's alleged infringement of its private rights. Accordingly, the fourth's defendant's contention that BU should have commenced its action by way of judicial review must be rejected. (paras 23 & 27)
- (2) In order to succeed on the principle of legitimate expectation, it was incumbent on BU to first show that the fourth defendant gave it a clear undertaking to close Jalan Tanjung once BU completed the construction of Jalan Hilir. The letter dated 13 September 1991 tendered as evidence by BU was the letter of undertaking from the fifth defendant which was consistent with the contemporaneous circumstances wherein BU was to seek the fifth defendant's permission to build an overhead bridge over the latter's land to enable BU to reconnect its lands. Therefore, BU had

- A failed to show that the fourth defendant gave an undertaking to close Jalan Tanjung upon completion of Jalan Hilir. Therefore, the fourth defendant was not bound by the doctrine of legitimate expectation to close Jalan Tanjung. (paras 30, 32 & 35)
- B (3) BU did not proffer any new evidence in support of its plea of equitable estoppel other than the letter dated 13 September 1991. As the letter was not related to the fourth defendant, BU's reliance on the doctrine of equitable estoppel must also fail as there was no evidence that the fourth defendant made any representation or assurance that Jalan Tanjung will not be closed. (para 41)
- C (4) The word 'shall' in s. 13(3) makes it mandatory that a posting of the intention must be made and the said posting must be at a prominent part of Jalan Tanjung. The fact that BU had knowledge of the intended conversion did not absolve the fourth defendant of its duties to ensure that the posting was done in accordance with the law. On the facts, although the fourth defendant did cause a posting of the intention to be made, the fourth defendant had failed to show (i) the posting was made at the relevant section of Jalan Tanjung; and (ii) even if it was so posted, the posting was made at a prominent part of that section of the road. (paras 46, 48 & 49)
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- E (5) Further, the posting was effected for 30 days from 7 December 2009 to 5 January 2010. In order to determine a Gregorian calendar month, time must be reckoned by looking at the calendar and not by counting the number of days. Based on the evidence and the law, the fourth defendant had failed to ensure that the posting of the intention was for the duration
- F stipulated by s. 13 of the Act. (para 53)
- G (6) In the circumstances, the prayer to declare null and void any proposed act or measure by the fourth defendant that would have the effect of depriving the plaintiffs of their exclusive use, enjoyment and development of their lands, in accordance with approvals hitherto granted, including the amended layout plan, insofar as the prayer was based on the doctrine of legitimate expectation and the doctrine of equitable estoppel, was dismissed. The declaration to the effect that s. 13 notice was invalid by reason of non-compliance with s. 13 of the Act was granted. The court also granted the prayer for a consequential order that the fourth defendant remove, withdraw or otherwise cease the
- H s. 13 notice which was the subject matter of the suit. (para 55)

Case(s) referred to:

- Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865 FC (*refd*)
- I *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283 FC (*refd*)

- Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sg Gelugor dengan Tanggungan* [1999] 3 CLJ 65 FC (*refd*) A
- O'Reilly v. Mackman* [1983] 2 AC 237 (*refd*)
- Setali Development Sdn Bhd & Anor v. Lim You Keng* [1983] 2 CLJ 250; [1983] CLJ (Rep) 359 FC (*refd*)
- Waltons' Store (Interstate) v. Maher* [1988] 164 CLR 387 (*refd*) B
- Legislation referred to:**
- Interpretation Acts 1948 and 1967, s. 3
- Street, Drainage and Building Act 1974, s. 13(3), (4), (5)
- Other source(s) referred to:**
- Sinnadurai, Law of Contract*, 4th edn, pp 1326-1327 C
- Halsbury's Law of England*, 4th edn Reissue, para 1030
- For the plaintiff - Mohd Arief Emran Ariffin, CK Lim & Deborah Yee; M/s Wong & Partners*
- For the 4th defendant - Kamaruzaman Muhammad Arif, Sofiah Omar & Nurliza Shafien; M/s Kamaruzaman Arif, Amran & Chong* D
- Reported by S Barathi*

JUDGMENT

Chan Jit Li JC:

- [1] There was an earlier order for the consolidation of two civil suits, namely: E
- (a) Civil Suit MT-21-4-2010 (the 2010 suit); and
- (b) Civil Suit No. 22 NCVC-1046-8-2012. F
- [2] The plaintiffs in Civil Suit MT-21-4-2010 are Bandar Utama City Corporation Sdn Bhd, a private limited company, and 24 others. Bandar Utama City Corporation Sdn Bhd is the holding company for the 24 other companies. Thus, for ease of reference, all the plaintiffs shall be collectively referred to as BU. G
- [3] There are five defendants in this action and they are:
- (a) the Town and Country Planning Department, Selangor (the first defendant);
- (b) the District Land Administrator, Petaling (the second defendant); H
- (c) the State Government of Selangor Darul Ehsan (the third defendant);
- (d) the Petaling Jaya City Council (the fourth defendant); and
- (e) the Malaysian Highway Authority (LLM) (the fifth defendant).
- [4] In the other action, namely, Civil Suit No. 22 NCVC-1046-8-2012, Bandar Utama City Corporation Sdn Bhd is the sole plaintiff. The suit was initiated against two defendants, namely: I

- A (a) the Mayor of the Petaling Jaya City Council (first defendant); and
(b) the Petaling Jaya City Council (second defendant).

On the day of the hearing, the claim against the first defendant was by consent withdrawn by the plaintiff with no order as to costs. Accordingly, the case against the first defendant was struck out with no order as to costs and the hearing proceeded with the Petaling Jaya City Council as the sole defendant.

- B [5] In this judgment, for a reason which is not necessary for me to state here, I shall be focussing only on BU's claim against the fourth defendant, namely, the Petaling Jaya City Council.

- C [6] The subject of this dispute relates to a road known as Jalan Tanjung Bandar Utama (Jalan Tanjung).

- D [7] Accordingly, BU seeks against the fourth defendant a declaration that any proposed act or measure by the Petaling Jaya City Council, including any proposed act or measure taken pursuant to s. 13 of the Street, Drainage and Building Act 1974, having the effect of depriving the plaintiffs of their exclusive use, enjoyment and development of their lands, namely, Lots 27679 and 27680, in accordance with approvals hitherto granted, including the amended layout plan, is null and void. There is also a prayer for a consequential order that the fourth defendant do forthwith remove, withdraw or otherwise cease the s. 13 notice which is the subject matter of this suit.

- E [8] At the hearing, BU called two witnesses. They are (1) a Director of Bandar Utama City Corporation Sdn Bhd (PW1), one Tan Sri Teo Chiang Kok; and (2) a surveyor, one Mr Foo Say Joon (PW2). The fourth defendant called only one witness. I shall identify him at the later part of my judgment.

- F [9] In the present case, BU's claim against the fourth defendant is premised on the doctrine of legitimate expectation, the doctrine of equitable estoppel and procedural non-compliance with s. 13 of the Street, Drainage and Building Act 1974.

- G [10] To understand this case, it is necessary to know the background facts leading to the dispute. BU was the owner of many parcels of land. These parcels of land were contiguous. However, due to the construction of the North Klang Valley Expressway (NKVE) highway, some of the lands were compulsorily acquired by the State Authority of Selangor. While some acquisitions involved the whole of the lands, others were acquired in parts. What is significant is that the various acquisitions fragmented BU's others contiguous lands. The lands lay severed.

- H [11] Because of this, BU needed a link to reconnect the severed lands. This link was vital; for, without the link, BU would encounter difficulties in developing its remainder lands. BU took the view that a linkage could be effected by building an overhead bridge. (The term 'overhead bridge' is used
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to describe a road built above ground level.) The only snag to this solution was that the overhead bridge had to be built over the fifth defendant's (LLM's) land. Thus, BU took steps to secure the fifth defendant's permission.

[12] The fifth defendant's response was positive. By way of a letter dated 13 September 1991 ('letter of 13th September') the fifth defendant gave its permission to BU. (I shall refer to this letter in greater detail at the later part of my judgment as this is the letter on which BU relies for its causes of action premised on the principle of legitimate expectation and on the principle of equitable estoppel.)

I digress here to add that this letter was addressed not only to BU but also to another company, namely, Tropicana Golf and Country Resort ('Tropicana'). Tropicana is another landowner within the same vicinity and it also faced the problem of access.

[13] The fifth defendant's permission came attached with several conditions. It is unnecessary to refer to all of the conditions. It suffices that for the purpose of this case to refer to just one particular condition: the fifth defendant required two roads; each to be built by BU and Tropicana. The first road was to be a permanent road. At the trial, this permanent road had by then come into existence. It is known as Jalan Hilir Bandar Utama ('Jalan Hilir').

[14] The other road was intended to be a temporary access. This temporary access was to address Tropicana's immediate need for an access to its lands pending the creation of Jalan Hilir. Once Jalan Hilir comes into existence, and after construction completes, Tropicana could access its lands by using Jalan Hilir instead of this temporary access. The temporary access would then be closed. Hence, the reference 'temporary access.' The temporary access referred to is Jalan Tanjung, the subject of the present dispute.

[15] Both BU and Tropicana accepted the conditions laid down by the fifth defendant. Their acceptance was sealed in the execution of an agreement between BU and Tropicana. For the purpose of this trial, it suffices to state here that by this agreement, BU undertook to construct Jalan Hilir and Tropicana agreed to construct Jalan Tanjung. The construction costs were borne by the respective entity tasked with constructing the relevant road.

[16] Upon completion of Jalan Hilir, BU gave Tropicana notice of intention to close Jalan Tanjung. BU faced opposition and the relevant State Authorities stepped in to find a solution. BU was asked to defer the closure of Jalan Tanjung pending the completion of another project known as the 'Twin Tunnels project'. BU acceded to the request.

[17] Upon completion of the Twin Tunnels project BU once again attempted to close Jalan Tanjung. Again BU faced opposition. This time the fourth defendant stepped in and requested BU to again defer the closure. This

- A deferment was to enable the fourth defendant to conduct a traffic study. The traffic study was for a duration of two weeks. BU again acceded to the request. However, before the completion of this two-week period, the fourth defendant issued a notice pursuant to s. 13 of the Street, Drainage and Building Act 1974 ('s. 13 notice'.) By this notice, the fourth defendant made clear its intention to convert part of Jalan Tanjung into a public road.
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[18] BU in exercise of its right as a frontager under s. 13(4) of the Street, Drainage and Building Act 1974 filed its objections to the s. 13 notice as one of frontage ('one of frontage' not clear to me what this means). When the fourth defendant failed to respond to its objections, BU instituted the instant action. At the same time, BU secured a court order to stay all further actions in respect of the s. 13 notice pending the disposal of this matter.

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- [19] Now, Jalan Tanjung is a relatively long road. In its endeavour to close this road, BU filed three cases. These cases deal with different sections of Jalan Tanjung. This case, the 2010 suit, in itself relates to two sections of Jalan Tanjung. In respect of one of the two sections, BU mounts its claim on the doctrine of legitimate expectation and on the doctrine of equitable estoppel; whilst in respect of the other section, BU contends that the s. 13 notice is bad in law.
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- [20] Before I proceed to deal with the merits of the case, there is a preliminary issue which I must deal with first. It relates to the mode in which BU has moved the court. Although no indication was given throughout the trial, Dato' Kamaruzaman bin Muhammad Arif ('Dato' Kamaruzaman'), learned counsel for the fourth defendant, submitted at the end of trial that BU's claim constitutes a challenge against a decision of a public authority. Therefore, the issue falls within the realm of public law and BU should have commenced its action by way of judicial review and not, as has been done here, by way of a writ action. BU's claim should be dismissed on account of this.
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- [21] In reply, Dato Mohd Arief Emran bin Arifin ('Dato' Emran'), another learned counsel for the plaintiffs, contended that BU's relief was premised on the Specific Relief Act 1950 which is a private law action. Further, it was unfair of the fourth defendant to raise this issue at so late a stage and to catch everyone by surprise. If the fourth defendant had taken objection to the mode, the objection should have been raised before the commencement of the trial and not at the end.
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- [22] *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865; [2010] 3 MLJ 145 is instructive on the issue of determining the mode to move the court. James Foong FCJ in delivering the decision of the Federal Court held (at pp. 896-898 (CLJ); p. 171 (MLJ)):
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[60] In view of the various decisions on this point, particularly that of YAB Dato' Dr Zambray, it is necessary for this court to clarify the law on this 'procedural minefield' (as Lord Lowery puts in *Roy v. Kensington and Chelsea FPC*).

[61] Aside from *mandamus*, prohibition, *quo warranto* and *certiorari*, or any others described under the pre-amended O. 53 of the RHC, an alternative remedy for an aggrieved party seeking relief against a public authority on his infringed right to which he was entitled to protection under public law is for a declaration. The courts had for a long time recognised their power to grant a declaration under common law. But s. 41 of the Specific Relief Act 1950 armed them with the statutory authority to do so. It is also commonly accepted that O. 15 r. 16 of the RHC also provides the High Court with such power (see Lord Diplock's judgment in *O'Reilly v. Mackman*). However, O. 53 of the RHC sets out a specific procedure for an aggrieved party seeking relief, including a declaration, against a public authority on his infringed right to which he was entitled to protection under public law to follow. It is our view that when such an explicit procedure is created to cater for this purpose, then as a general rule all such application for such relief must commence according to what is set down in O. 53 of the RHC otherwise it would be liable to be struck off for abusing the process of the court. This general rule enunciated in *O'Reilly v. Mackman* has in fact been acknowledged by this court in *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* and repeated in YAB Dato' Dr Zambray. However, like all general rule, there are exceptions. This again was recognised by Lord Diplock in *O'Reilly v. Mackman* where he referred to 'particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law or where none of the parties objects to the adoption of the procedure by writ, or originating summons'. Then of course there is the exception for a claim against the public authority for negligence as decided in *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors*. There may be others and these 'are left to be decided on a case to case basis' as spoken of by Lord Diplock in *O'Reilly v. Mackman*. The circumstances in YAB Dato' Dr Zambray is obviously one of them where this court found that a challenge by the appellants of their suspension from attending a State Legislative Assembly is a matter that affects their legal status is an exception. For this, the aggrieved party can commence their claim by way of an originating summons rather than an application under O. 53 of the RHC.

[62] We observed that a challenge on the use of appropriate procedure is very much fact based. Thus, it is necessary for a judge when deciding on such matter to first ascertain whether there is a public law element in the dispute. If the claim for infringement is based solely on substantive principles of public law then the appropriate process should be by way of O. 53 of the RHC. If it is a mixture of public and private law then the court must ascertain which of the two is more predominant. If it has substantial public law element then the procedure under O. 53 of the RHC must be adopted. Otherwise it may be set aside on ground that it abuses the court's process. But if the matter is under private law though concerning a public authority, the mode to commence such action under O. 53 of the RHC is not suitable. Aside from this, there could be other circumstances like the kind in YAB Dato' Dr Zambray. Much depends on the facts of the case. But generally the court should be circumspect in

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- A allowing a matter which should be by way of O. 53 of the RHC to proceed in another form. To say that it is opened to any applicant seeking judicial review to elect any mode he prefers, as implied in *Kuching Waterfront*, would, in our considered opinion, be rendering O. 53 of the RHC redundant. This is certainly not the intention of the drafters of this rule who had a purpose in mind. When the purpose of this rule is in the interest of good administration then this rule must be adhered to except in the limited and exceptional circumstances discussed.
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[23] With that, I ask myself the question - which element is predominant in this case? After considering the factual matrix of this case, I conclude that it is private law element which is predominant.

- C [24] The undisputed facts have shown BU's lands to be initially contiguous and this characteristic facilitated ease of development. Through no fault of BU but simply due to the unfortunate manner in which its lands were acquired, its lands laid fragmented. It was therefore natural for BU to seek a convenient linkage.
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- E [25] According to BU, its future plan for development of the remainder lands is to tout the developed lands as a serene sanctuary. If Jalan Tanjung continues to be open, BU will lose this advantage (as a serene sanctuary) as the traffic density at Jalan Tanjung is excessively high. BU also claims that it is this very heavy traffic density from Jalan Tanjung the reason why SONY, BU's anchor tenant at its High Tech Park, had chosen to terminate the tenancy. Thus the non-closure of Jalan Tanjung will affect BU, both adversely and severely.

- F [26] In short, all that BU seeks is a closure of a road which had always been intended as a temporary access so as to salvage BU's remainder lands.

- G [27] From the above facts, I find that there are no legal issues of public importance here. I also find that BU's so-called challenge of a decision by a public authority (fourth defendant) to be nothing more than a collateral issue to BU's alleged infringement of its private rights. Accordingly, the fourth defendant's contention that BU's should have commenced its action by way of a judicial review must be rejected.

- H [28] Having so concluded, I now turn to the substantive issues. From the submissions made by all parties, I discern the following issues require determination:

- I (i) Whether the fourth defendant is bound by the doctrine of legitimate expectation to close Jalan Tanjung?
- (ii) Whether the fourth defendant is bound by the doctrine of equitable estoppel to close Jalan Tanjung?
- (iii) Is the s. 13 notice issued by the fourth defendant valid?

Whether The Fourth Defendant Is Bound By The Doctrine Of Legitimate Expectation To Close Jalan Tanjung? A

[29] The doctrine of legitimate expectation was first developed in English law as a ground of judicial review in administrative law to protect a procedural or substantive interest when a public authority rescinds from a representation made to a person. In *O'Reilly v. Mackman* [1983] 2 AC 237, HL (UK) the doctrine was recognised by the House of Lords as part of judicial review in public law. In Malaysia, the doctrine of legitimate expectation was succinctly stated in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sg Gelugor dengan Tanggungan* [1999] 3 CLJ 65; [1999] 3 MLJ 1. In delivering the decision of the Federal Court, Edgar Joseph FCJ held (at pp. 117-118 (CLJ); p. 59 (MLJ)): B C

For our part, we prefer the view of Simon Brown LJ in *Ex parte Baker* (*ibid*) and Sedley J in *Ex parte Hamble* (*ibid*) as we find the reasoning there more persuasive. It is also a view which appears to be supported by de Smith, as the following extracts from his book, *Judicial Review of Administrative Action* (5th edn), indicate (at paras. 13-034): D

Given the duty of a public body not to fetter its discretion under what circumstances will a legitimate expectation be protected in the face of a change in policy. Clearly, the change of policy must be 'a lawful exercise of discretion' (per Lord Scarman in *Re Findlay* [1985] AC 318 338). The body's discretion to alter its policy must therefore be exercised after taking into account relevant considerations, and ignoring the irrelevant. The body must also pursue authorised and not extraneous purposes. These considerations and purposes can include matters such as the need to maintain national security and matters of public policy. Nor should the discretion be exercised unreasonably - for example, simply in order to confound the recipient of the expectation, or in bad faith. The conduct of the recipient of the representation should not be relevant to a decision to revoke the representation. E F

After referring to the potential antithesis between the object of the protection of the legitimate expectation (legal certainty) and the object of the 'no fettering' doctrine (flexibility) and observing that the issue may not always be resolved in favour of the latter, de Smith says (at paras 13-035): G

Although free to alter its policy, the authority is by no means free to ignore the existence of a legitimate expectation. Now that legitimate expectation has been accepted in law as an interest worthy of protection, its existence becomes a relevant consideration which must be taken into consideration in the exercise of a discretion. It is placed on the scale and must be properly weighed. H

Dealing with the balancing exercise, de Smith, says this (in the same paragraph): I

The weighing is, as we have noted many times, a matter principally for the authority, but the courts may intervene where the expectation is entirely ignored or given manifestly improper weight

- A (see *R v. Inland Revenue Commissioners; ex p MFK Underwriting Agents Ltd & Ors* [1990] 1 WLR 1545 per Bingham LJ when he said breach of an expectation may be unfair ‘particularly’ if the promisee acted on it. Cf the approach of Laws J in *Secretary of State for Transport; ex p Richmond-upon-Thames London Borough Council & Ors* [1994] 1 WLR 74). On the other hand, in *R v. Ministry of Agriculture, Fisheries and Food; ex p Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714 Sedley J accepted the existence of the substantive legitimate expectation).
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Continuing on the same theme, de Smith says this (at paras 13-035):

- C It is at this point that the fact that the promisee relied on the expectation to his detriment may be relevant. Detrimental reliance will add to the weight of the legitimate expectation. It may be overridden by competing public interest, but the greater the evident detriment to the promisee, the greater the countervailing weight of the public interest in order to override an expectation that is held to be legitimate.
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[30] It is clear from the above passages that in order to succeed on the principle of legitimate expectation, it is incumbent on BU to first show that the fourth defendant gave it an undertaking. The undertaking must be clear and that is to close Jalan Tanjung once BU completes the construction of Jalan Hilir.

- E [31] BU’s sole evidence of the undertaking takes the form of the following letter (‘13th September letter’):

Bil surat kami: Bil (ii) dlm. LLM/7/UE/1/2A/AM/Jld III
Tarikh: 13/09/91

- F 1. Tropicana Golf & Country Resort Sdn. Bhd
Level 15 Shahzan Prudential Tower
30 Jalan Sultan Ismail
50250 Kuala Lumpur
(u/p: En Harminder Singh)

- G 2. Damansara Jaya Sdn. Bhd
1 Persiaran Bandar Utama
Bandar Utama
47400 Petaling Jaya
Selangor Darul Ehsan
(u/p: En. Joseph S.K. Tan)
- H Tuan

- I PER: (A) CADANGAN PEMBANGUNAN DI ATAS LOT 2813,
MUKIM SG BULOH DAERAH PETALING: JALAN KELUAR/
MASUK (OLEH TROPICANA GOLF AND COUNTRY RESORT
SDN BHD)

(B) CADANGAN PEMBANGUNAN DI ATAS LOT 97, 373, 2814, 15388, 15389, 15390 DAN 2810 MUKIM SG. BULOH DAERAH PETALING: PERSIMPANGAN BERTINGKAT YANG MELINTAS JALAN HUBUNGAN KE PLAZA TOL DAMANSARA, LEBUHRAYA BARU LEMBAH KELANG (OLEH DAMANSARA JAYA SDN. BHD.)

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Perkara di atas dan permohonan tuan yang dimaksudkan adalah dirujuk.

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Sehubungan dengan ini serta susulan daripada beberapa mesyuarat yang telah diadakan diantara pihak pemaju, juruperunding pemaju, Perancang Bandar dan Desa Negeri, Jabatan Bekalan Air, Pengurusan Lebuhraya Berhad, Project Lebuhraya Utara Selatan Berhad (PLUS) dan Lembaga Lebuhraya Malaysia (LLM), pihak kami mendapati bahawa permohonan ini melibatkan dua pihak pemaju yang berkenaan.

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Pihak Lembaga Lebuhraya Malaysia pada dasarnya tidak mempunyai apa-apa halangan ke atas permohonan tersebut dan pertimbangan selanjutnya boleh diberikan tertakluk kepada syarat-syarat berikut di mana penyelarasan perlu dibuat diantara kedua pihak pemaju yang terlibat iaitu:

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(a) Temporary access roads coloured pink by Tropicana Golf and Country Resort Sdn. Bhd. (TGCR) shall be constructed together with the overbridge by Damansara Jaya Sdn Bhd (DJSB). Refer to layout sketch LLM/NKVE/2A/DLR 1 & 2.

(b) Temporary access roads by TGCR must be outside the limits of future extension of the Damansara Toll Plaza and its future approach roads.

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(c) For all temporary roads outside LLM's R.O.W. consent must be obtained by the landowner prior to construction.

(d) All roads coloured pink shall be a temporary access for TGCR until such time when the permanent road network by DJSB is completed, then all these temporary accesses shall be sealed off indefinitely including the medians. Refer to layout sketch LLM/NKVE/2A/DLR 1 & 2.

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(e) No right turning movement is allowed from the ramp onto the bridge. Median has to be extended accordingly.

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(f) Traffic lights shall be installed for traffic movement turning right from the bridge onto the ramp merging with mainline.

(g) The design parameters used for acceleration and deceleration has to review accordingly as per attached sketch in Appendix I LLM/NKVE/2A/DLR. 3.

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(h) JBA shall be allowed to use the temporary access road to enter the Effingham Water Reservoir until permanent road network is completed.

(i) The developer shall be allowed one way in only from the mainline during construction period and to ensure also that the mainline and drainage is free from all silts and dust during this period.

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- A (j) The developer shall ensure that all the access roads are well maintained. For those sections of the access roads that are within PLUS's maintenance limits, the developer shall enter into an agreement with PLUS as to their obligations and reimbursement of the maintenance costs. A draft copy of the agreement shall be sent to Lembaga Lebuhraya Malaysia for its scrutiny, prior to signing the agreement.
- B
- (k) Other conditions as stipulated by the State Town Planner based on the endorsed layout drawings and in compliance with other local authorities.
- C (l) All detail engineering design must be submitted to LLM for approval prior to commencement of works.
- (m) LLM reserves the right to review the temporary access road should the service level of the Damansara link road is affected, and take appropriate action regarding the temporary access roads, including ordering their closure.
- D (n) The developers must ensure that the accesses to the surrounding kampungs that are facilitated by the existing median openings, will not be affected by the construction of the slip roads. Otherwise the developers are required to provide satisfactory solutions.
- E (o) All the conditions stated above shall remain effective even though there is a change in management. It is mandatory on the part of the developers to inform the new management of these conditions.

Di dalam hal-hal yang demikian, sekiranya terdapat pertindihan syarat-syarat yang melibatkan kedua-dua pihak pemaju, maka penyelarasan dan penyelesaian perlu dibuat terlebih dahulu sebelum kerja-kerja dimulakan. Bersama-sama ini dimajukan lukisan LLM/NKVE/2A/DLR 1 & 2 dan Appendix I LLM/NKVE/2A/DLR 1 & 2 untuk rujukan selanjutnya.

Sekian, terima kasih.

“BERKHIDMAT UNTUK NEGARA”

G Saya yang menurut perintah

t.t

(IR. DATO' MICHAEL YU WEN CHIEH)

Ketua Pengarah, Lembaga Lebuhraya Malaysia.

H s.k. - Pengarah Perancang Bandar & Desa (u/p : Puan Jamiah)

- J.K.R. Selangor (u/p: Ir. Mohamed bin Hussin)
(Rujukan tuan JN.SEL.D3/3229(11) - 26.10.90
- J.B.A. Selangor (u/p : Ir. Ng Seik Loong)
- PLUS

I

- PLB
- Zaidun - Leeng Sdn. Bhd.
- Perunding Talico
- Pengarah Wilayah Tengah, L.L.M

(emphasis added.)

[32] My first observation is this. The fourth defendant was not responsible for the 13th September letter. The letter is from the fifth defendant (the Malaysian Highway Authority, LLM) and the alleged undertaking was by the fifth defendant itself. And this would be consistent with the contemporaneous circumstances then as PW1 had admitted that BU had to seek the fifth defendant's permission to build an overhead bridge over the latter's land to enable BU re-connect its lands.

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[33] It was submitted by learned counsel for the BU that regardless of who issued the 13th September letter, the fourth defendant was still bound by the undertaking contained therein. They argued that this was because prior to the issuance of this letter, the fifth defendant had had meetings with the relevant bodies including the fourth defendant. Therefore, the fifth defendant's undertaking must be taken to mean that the fourth defendant too had consented to the said undertaking.

C

[34] This argument by learned counsel for BU is wholly unsubstantiated by evidence. The only mention of 'meetings' in the 13th September letter is in para. 2. But there is no mention of the fourth defendant in that paragraph. As a matter of fact, there is no mention of the fourth defendant in the whole of the said letter.

D

[35] Based on the above, it is my finding that BU has failed to show that the fourth defendant gave an undertaking to close Jalan Tanjung after BU completes the construction of Jalan Hilir. As the undertaking is the very foundation of the doctrine of legitimate expectation, it is unnecessary for me to consider the other elements of the doctrine. The fourth defendant is not bound by the doctrine of legitimate expectation to close Jalan Tanjung.

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F

Whether The Fourth Defendant Is Bound By The Doctrine Of Equitable Estoppel To Close Jalan Tanjung?

[36] *Halsbury's Law of England* (4th edn Reissue) para. 1030 states the doctrine of equitable estoppel as follows:

The *High Trees* principles usually arise where there is a contract between A and B, and B subsequently grants to A a concession, not supported by consideration, that he will not enforce a particular provision of their contract. Whilst the principle is not confined to concessions in respect of pre-existing contractual rights, it only applies where there is some contractual relationship between the parties. Where there is the required pre-existing relationship between the parties, it seems that the *High Trees* doctrine cannot be used as a cause of action, but only by way of defence. Within that context, the doctrine requires an unambiguous representation of intention by B and a reliance on that representation by A in circumstances where it is inequitable for B to go back on his concession. Even then, the effect of the concession is usually only temporary.

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- A [37] The law of estoppel in equity came to be represented by two distinct categories of estoppel: 'promissory estoppel' and 'proprietary estoppel'. In dealing with the elements of the said doctrine, the learned author of *Sinnadurai: Law of Contract*, 4th edn (at pp. 1326 to 1327) writes as follows:
- B [15.03] Main elements. As will be seen in the discussion below, the courts have used the term 'equitable estoppel' to embrace not only promissory estoppel but also what has been termed as proprietary estoppel which is said to be a sub-species of promissory estoppel: 'both can arise the promises; consideration is not, while action in reliance is, a necessary condition for their operation'.
- C As Lord Walker of Gestingthorpe observed in *Thorner v. Major Ors*, the doctrine of proprietary estoppel is based on three main elements:
- ... a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance ...
- D This was in turn amplified by Lord Scott of Foscote:
- Lord Walker, in paragraph 29 of his opinion [in *Thorner*] identified the three main elements requisite for a claim based on proprietary estoppel as, first, a representation made or assurance given to the claimant; second, reliance by the claimant on the representation or assurance; and, third,
- E some detriment incurred by the claimant as a consequence of that reliance. These elements would, I think, always be necessary but might, in a particular case, not be sufficient. Thus, for example, the representation or assurance would need to have been sufficiently clear and unequivocal; the reliance by the claimant would need to have been reasonable in all the circumstances; and the detriment would need to have been
- F sufficiently substantial to justify the intervention of equity.¹⁴
- G [38] Promissory estoppel is meant to prevent any inequity or injustice caused by the action of the promisor in reneging on his promise, which has initially led the promisee to act to his detriment. It is meant to stop a person from changing his earlier representation, in a situation where another person has, in reliance upon that representation, altered his position. Traditionally the doctrine is limited, *inter alia*, (1) to be used only as a defence, and not to be used as a cause of action against another; and (2) to contracting parties. However, today the law has developed: we no longer have these limitations for the application of the doctrine.
- H [39] In Malaysia, the departure from the traditional approach in applying promissory estoppel is led by the landmark case of *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; [1995] 3 MLJ 331 where estoppel was considered as a doctrine of wide utility that must be resorted to in varying fact patterns to achieve justice. In the words
- I of Gopal Sri Ram JCA (as he then was):

The time has come for this court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.

A

The Federal Court ruled that the doctrine is not limited to the defendant alone or to contracting parties only. A plaintiff is now allowed to use the doctrine as an independent cause of action. (See also the Australian High Court case of *Waltons' Store (Interstate) v. Maher* [1988] 164 CLR 387.)

B

[40] In dealing with the elements of the said doctrine, the learned author of *Sinnadurai, Law of Contract* 4th edn (at pp. 1326 to 1327) writes as follows:

C

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D

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... a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance ...¹³

E

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[41] In the instant case, BU does not proffer any new evidence in support of its plea of equitable estoppel. It merely relies on the 13th September letter. In the light of my finding that the 13th September letter has nothing to do with the fourth defendant, it is also my finding that BU's reliance on the doctrine of equitable estoppel must also fail as there is no evidence that the fourth defendant made any representation or assurance that Jalan Tanjung will not be closed.

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A *Is The s. 13 Notice Issued By The Fourth Defendant Valid?*

[42] Section 13 of the Street, Drainage and Building Act 1974 ('the Act') empowers a local authority to convert a private road into a public road whether upon receiving an application or on its own motion. In this case, the fourth defendant on its own motion elected to exercise its powers under s. 13 of the Act to convert Jalan Tanjung into a public road.

[43] The procedure to be adopted in the event of a conversion is also provided for in the same section. It reads as follows:

Private streets may be declared public streets

C 13. (1) If any street, not being a public street, is levelled, channelled and drained, and either paved, metalled or flagged to the satisfaction of the local authority, it may, whether at the request of the frontagers or otherwise, if it thinks fit, declare that at the expiration of one month from the date thereof the said street shall become a public street.

D (2) Notwithstanding subsection (1) the local authority may require the frontagers to provide lighting for the street to the satisfaction of the local authority as a condition precedent to the declaration under subsection (1).

(3) A copy of the intention to declare such street as a public street shall be forthwith posted up in some prominent part of the said street.

E (4) At the expiration of the said period, unless the frontagers or such frontagers having the greater part in the annual value have, by notice to the local authority in writing under their hands, objected thereto, the said street shall become a public street and forever afterwards be maintained by the local authority.

F (5) After considering the objections or if there is no objection after the expiration of the said period the local authority shall declare the street as a public street.

G [44] Dato Emran contends that the s. 13 notice is bad in law as there was obvious non-compliance of the statutory requirements. He submits that the fourth defendant had failed to show that the latter had posted a copy of the intention to declare Jalan Tanjung as a public street at some prominent part of Jalan Tanjung. In addition to that the posting at the unidentified area was effected for the period of a month. Finally, the fourth defendant failed to take into consideration the objections filed.

H [45] In reply, Dato Kamaruzaman submits that it is irrelevant where the posting was made. It suffices that a posting was made and BU was aware of it. He, however, did not reply in respect of the period of the posting.

I [46] I hold the view that the use of the word 'shall' in s. 13(3) makes it mandatory that a posting of the intention must be made and that the said posting must be at a prominent part of Jalan Tanjung. The fact that BU had knowledge of the intended conversion does not absolve the fourth defendant

of its duties to ensure that the posting was done in accordance with the law. I look to the evidence of the fourth defendant's witness, DW3, to determine whether or not the fourth defendant has complied with the statutory requirements, that is to say, that the posting was effected at a prominent part of Jalan Tanjung.

[47] One Encik Ismail b Shafie (DW3), is the fourth defendant's Director of Engineering Department ('Pengarah, Jabatan Kejuteraan MBPJ'.) Under cross-examination, he said:

Q : Setuju atau tidak bahawa Majlis Mesyuarat Kerajaan Negeri telah mengambil keputusan untukewartakan Jalan Tanjung sebagai jalan awam dan memasang notis pemberitahuan cadangan untukewartakan Jalan Tanjung di bawah milik Bandar Utama City Corporation Sdn. Bhd. sebagai jalan awam. Betul?

A : Setuju.

....

Q : Tidak disebut, ok. Jadi setuju atau tidak bahawa keputusan telah dibuat untukewartakan Jalan Tanjung sebagai jalan awam berdasarkan notis ini? Setuju?

A : Setuju.

Q : Now kalau Encik telah menyatakan bahawa Encik faham keperluan s. 13 kan, dan saya tak perlu Encik tahu lebih mendalam mengenai s. 13 daripada saya tapi tolong tandakan di mana notis-notis ini telah diletakkan?

A : Saya kurang pasti.

Q : Tak pasti?

A : Sebab saya tidak ada pada masa itu.

Q : Jadi Encik tahu atau tidak kat mana diletakkan?

A : Saya, yang berdasarkan pada pelan, sorry, pada fail dinyatakan di beberapa tempat di Jalan Tanjung.

Q : Jadi tak tau kat mana?

A : Seperti disebut di Jalan Tanjung berhadapan Sekolah Jenis Kebangsaan Cina Damansara di persimpangan lampu isyarat di Jalan Tanjung.

Q : Tapi Encik tak boleh nyatakan di mana diletakkan di sini? Tak Pasti? Tapi adakah ianya diletakkan di Y dan Z?

A : Tak pasti

....

- A [48] From the evidence of DW3', I am satisfied that the fourth defendant did cause a posting of the intention to be made. I am also satisfied that it was made at a junction in front of 'Sekolah Jenis Kebangsaan Cina Damansara'. However, although DW3 was able to confirm that this school is situated at Jalan Tanjung, he did not know whether this location falls within the section of Jalan Tanjung that the fourth defendant seeks to convert into a public road.
- B

[49] In view of the inability of DW3 to confirm the actual site of the posting, it is my finding that the fourth defendant has failed to show, firstly, that it made a posting of the intention at the relevant section of Jalan Tanjung and, secondly, even if it was so posted, the posting was made at a prominent part of that section of the road.

C

[50] As to the duration of the posting, DW3 said:

Q : Setuju dengan saya bahawa notis yang dikeluarkan di bawah s. 13 ini telah dicapak?

- D A : Dipacak.

Q : Dipacak di tempat-tempat di Jalan Tanjung hanya selama 30 hari. Betul?

A : Ya.

- E Q : Dan di bawah s. 13 Akta Jalan, Parit dan Bangunan tempoh masa yang dinyatakan adalah satu bulan. Betul?

A : Ya, Betul. ... kita mengambil kira satu bulan itu 30 hari.

- [51] There is no definition of the term 'a month' in the Act. Hence, I agree with Dato Emran that the Act should be read together with s. 3 of the Interpretation Acts 1948 and 1967 which provides as follows:
- F

Definitions.

'month' means a month reckoned according to the Gregorian calendar.

- [52] The Federal Court in *Setali Development Sdn Bhd & Anor v. Lim You Keng* [1983] 2 CLJ 250; [1983] CLJ Rep 359 explains the meaning of 'a month' reckoned according to the Gregorian calendar as follows (at p. 359):
- G

Under r. 151 of the Rules of the Federal Court 1980 the word 'month' shall be computed by calendar month according to the Gregorian calendar. The phrase 'calendar month' has been judicially considered in many authorities but we need only mention *Migotti v. Colvill* [1979] Vol. IV CPD 233 where it was held that 'a calendar month is a month which ended on the same date at it commenced on the previous month.' Brett LJ in that case puts the principle clearly as follows at p. 238.

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- I I am of opinion that the term a calendar month is a legal and technical term, and that we are bound to interpret its legal and technical meaning. The meaning of the phrase is that in computing time by calendar months, the time must be reckoned by looking at the calendar and not by counting days.

See also *Marren v. Dawson Bentley & Co. Ltd.* [1961] 2 All ER 270. Thus for example if an act is to be done within one month from 15 January the last date for doing the act is 15 February - see Note 2 O. 3 at p. 12 of the *English Supreme Court Practice* 1979 Vol. 1.

A

Since the order appealed against was made on 28 February 1982 the period of one month under r. 56 of the Rules of the Federal Court 1980 runs from 1 March 1982. The notice of appeal filed on 29 March 1982 was therefore filed well within time.

B

[53] Going by the above authority, in order to determine a Gregorian calendar month, time must be reckoned by looking at the calendar and not by counting the number of days. In the present case, the fourth defendant's witness, DW3, that the posting was effected for 30 days. He testified as follows:

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Notis s. 13 tersebut dipaparkan dari 7.12.2009 sehingga 5.01.2010.

In other words, DW3 was merely counting the number of days. (Paragraph 50 is also referred). Therefore, on the evidence, and applying the law, it is also my finding that the fourth defendant had failed to ensure that the posting of the intention was for the duration stipulated by s. 13.

D

[54] On BU's contention that the fourth defendant had failed to consider BU's objections as mandated by s. 13(5) of the Act, DW3 explained that due to the court order for stay obtained by BU, all of the s. 13 notice proceedings have been held in abeyance. This included BU's objections. I accept DW3's explanation.

E

[55] In conclusion, in relation to BU's action against the fourth defendant, I dismissed the prayer to declare null and void any proposed act or measure by the Petaling Jaya City Council that will have the effect of depriving the plaintiffs of their exclusive use, enjoyment and development of their lands, namely, Lots 27679 and 27680, in accordance with approvals hitherto granted, including the amended layout plan, insofar as the prayer is based on the doctrine of legitimate expectation and the doctrine of equitable estoppel. However, I grant the declaration prayed for to the effect that the s. 13 notice was invalid by reason of non-compliance with s. 13(3) of the Street, Drainage and Building Act 1974. I also grant as prayed for a consequential order that the fourth defendant do forthwith remove, withdraw or otherwise cease the s. 13 notice which is the subject matter of this suit.

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